

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1276

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

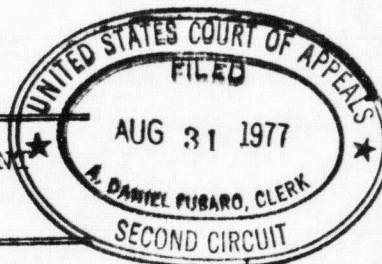
TON YOW HOM, a/k/a
TOM YEW HOM,

Defendant-Appellant.

Docket No. 77-1276

*B
P/S*

APPENDIX FOR APPELLANT
TON YOW HOM



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
TON YOW HOM
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

U.S. TITLE SECTION OFFENSES CHARGED ORIGINAL COUNTS
21:312, 841(a)(1) Distr. & possess. of Heroin, I. 1&2
& 841(b)(1)(A)

4/21

U.S. MAG. CASE NO. 77-114
RELEASE
AMT. ☐ Fugitive
Denial ☐ Pers. Recog.
Set ☐ PSA
S. ☐ NO ☐ CONDITIONS
Date ☐ 10% Deposit
☐ Surety Bond
☒ Bail Not Made ☐ Collateral
☐ Status Changed (See Docket) ☐ 2nd ☐ 1st ☐ Other
SENTENCE
☐ Convicted ☐ On All Charges
☐ Acquitted ☐ On Lesser Charge
☐ Dismissed ☐ WOP ☐ Other
☐ On Government is Motion

II. KEY DATES & INTERVALS

ARREST OF ☒ INDICTMENT ☒ ARRAIGNMENT ☒ TRIAL
U.S. Custody Begin ☐ High Risk Date ☐ Information ☐
* 1/31/77 2-9-77
Summons Served ☐ Indict. Waived ☐ 1st Plea ☒ 2-10-77
First Appearance ☐ In Charging District ☐ Superceding ☐ Indict. Info ☐ Trial Set For ☐ Trial Began ☒ 4-20-77
Final Plea ☐ G. Plea ☐ W. Drawn ☐ Trial Ended ☒ 4-27-77

MAGISTRATE
SEARCHED ☐ INDEXED ☐ SERIALIZED ☐ FILED ☐
DATE 2/1/77 INITIAL NO. S.S. 08AE
INITIAL APPEARANCE DATE > 2/1/77
PRELIMINARY EXAMINATION OR REMOVAL HEARING
Date Scheduled 2/8/77
S.S. 08AE
WAVED ☐ NOT WAVED ☒
INTERVENING NO. ☐ OUTCOME
HELD FOR SHOW OTHER PROCEEDING IN THIS DISTRICT
HELD FOR SHOW OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst. Rhea Kemble-Neugarten
791-1920
ATTORNEYS
Defense ☐ C.A. ☐ Rep. ☐ Waiver ☐ S.A. ☐ None / Other ☒ Legal Aid Society
15 Park Row, 10th Floor, N. Y. C. 10038
577-3407

DATE	DOCUMENT NO.	PROCEEDINGS	EXCUDABLE DELAY
2/1/77		Complaint filed, Legal Aid assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$10,000 cash or surety.	
2-9-77		INDICTMENT FILED, 77 CR. 88.....Tenney, J.	
2-10-77		Deft. (no atty. present). Court directs a plea of not guilty be entered. (Interpreter-not present). Deft. continued remanded in lieu of bail as fixed by Magistrate, ie. \$10,000. Case assigned to Lasker, J. for all purposes.....Tenney, J.	
5-2-77		Filed Govts. Memorandum in opposition to Dfts. motion to dismiss the indictment.	
4-20-77		Dft. pres w/ atty. Roland Thau, Robert Costello, AUSA pres., Stephen Pan interpreter - Evidentiary Hearing held (begun & concluded) Trial begun Lasker J.	
4-21-77		Trial Cont'd	
4-22-77		" "	
4-25-77		" "	
4-26-77		" "	
4-27-77		" " & Concluded. Dft. Guilty on Counts 1 & 2 PSI Ordered. Dft. Remanded. Sentence set for 6-10-77.....Lasker J.	

5-11-77 Filed Order that Laura Ho, 45 Christopher St., NY be engaged as an interpreter at least 24hrs. ,etc. not to exceed \$30.00, pur. to 28FRCrP.....Lasker J. (mn)

5-16-77 Filed transcript of record of proceedings, dated 4-25-77

5-15-77 Filed Dfts. Memorandum of Law.

5-17-77 Filed PRB in the Amount of \$10,000 Secured by \$1,000 cash (M 19-1-4757) pending appeal.

5-17-77 Filed Judgment & Commitment (Atty. Roland Thau Pres.) The Dft. is hereby committed to the Atty. Gen. or his authorized representative for imprisonment for a period of EIGHTEEN (18) MONTHS on Court 1 & 2. Said Sentences are to run concurrently & not consecutively. Upon the expiration of the term of imprisonment the dft. shall serve a Special PAROLE of THREE (3) YEARS. RIGHT TO APPEAL.....Lasker J.
Issued Commitment 6-21-77

6-20-77 Filed Remand.

6-21-77 Filed Dfts. Notice of Appeal from Judgment dtd. 6-17-77. (mn)

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 0088

UNITED STATES OF AMERICA

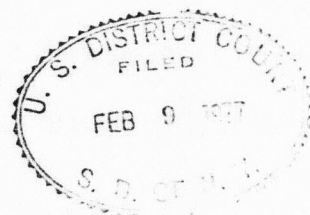
- v -

TON YOW HOM, a/k/a Tom Yew Hom,

Defendant.

INDICTMENT

77 Cr.



COUNT ONE

The Grand Jury charges:

On or about the 27th day of February, 1976
in the Southern District of New York, TON YOW HOM, a/k/a
Tom Yew Hom, the defendant, unlawfully, intentionally and
knowingly did distribute and possess with intent to dis-
tribute a Schedule I narcotic drug controlled substance,
to wit 25.3 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)

COUNT TWO

The Grand Jury charges:

On or about the 19th day of March, 1976
in the Southern District of New York, TON YOW HOM, a/k/a
Tom Yew Hom, the defendant unlawfully, intentionally and
knowingly did distribute and possess with intent to dis-
tribute a Schedule I narcotic drug controlled substance,
to wit, 72.3 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)

Emil H. Kury
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

MICROFILM

FEB 9 - 1977

United States District Court
SOUTHERN DISTRICT OF NEW YORK
THE UNITED STATES OF AMERICA

Robert Indella
vs.

TON YOW HOM, a/k/a Tom Yew Hom,

Defendant.

INDICTMENT

77 Cr.

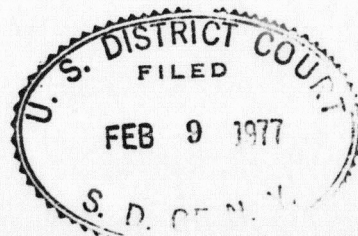
(Title 21, United States Code,
Sections 812, 841(a)(1) and
841(b)(1)(A).)

ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Carol K. ...
Foreman.



January 7, 1977 - First Appearance

Denney J.

February 10, 1977 - Dept. (no atty present).
Court directs a plea of not guilty be
entered. (Interpreter - not present). Dept.
continued remanded in lieu of bail as fixed
by Magistrate, i.e. \$10,000. Assigned
Rasker for all purposes. RS Denney J.

April 20, 1977 -

Dept. pres by Atty Roland Thau.
Robert Costello, AUSA, pres. -
Stephen Pan. Interpreter -
Credentialed Hearing held - (begin & concluded)

Trial began - Tashir J.

April 21, 1977 - Trial cont'd

April 22, 1977 - Trial cont'd

April 25, 1977 - Trial cont'd

April 26, 1977 - Trial cont'd

April 27, 1977 - Trial cont'd & concluded.

Dept guilty on Counts 1 & 2, P.S. 1000.

Dept. re-informed. Sentence set for
June 10, 1977.

8

June 17, 1977 (Indefinite Carolee Ling...
Deft present by Atty Roland, Jan
Eighteen (18 Months on Ct 1 & 2.

d. Said sentences to run concurrently
& not consecutively. Upon expiration
of the term of imprisonment the deft
shall serve a Special Parole of
Three (3) years. Bail reduced to
PRB of Ten thousand (\$10,000)
secured by amount of money found at
time of arrest. Deft to report twice
a week to marshal's office (by noon of
each Mon & Thurs.) until appeal is decided.

Jasha. J.

1 jgbg 6

2 (In open court, jury present.)

3 CHARGE OF THE COURT

4 (Lasker, J.)

5 THE COURT: Ladies and gentlemen, I am going
6 to ask you to give me your careful and undivided attention
7 while I read the charge to you in this case. I wish I
8 could give you instructions as to the law simply by chatting
9 like I'm doing now, because I think that is a more
10 effective way of getting my points across. But, unfortu-
11 nately, like everything else in life, the law has gotten
12 pretty complicated these days and we judges don't like to
13 take a chance on making mistakes, not only because we
14 might be reversed, which we don't invite, but also, and
15 most importantly obviously, because we don't want to make
16 mistakes with regard to the rights of a defendant or the
17 Government.

18 So we do reduce our charges ordinarily to
19 writing. I mention that for two reasons: ~~first~~ to explain
20 to you why I will be reading; and, secondly, because I
21 know I ~~am~~ something of a failure in reading fast. ~~So~~ I
22 invite you, should I read too fast for you to be able to
23 understand, to raise your hand or let me know.

24 Ladies and gentlemen, now that you've heard
25 the testimony and the arguments of counsel, the time has

US v. Hom4
77 Cr. 88
(MEL) 5
4/27/77

1 jgbg 7

2 come to instruct you regarding the law governing the case.

3 You have been chosen and sworn as jurors in
4 this matter to try the issues presented by the allegation
5 of the indictment and on your determination of the facts,
6 and I stress the words "your determination," to decide
7 under the law, as I shall instruct you, whether the Govern-
8 ment has proven either of the two charges in the indictment
9 against Mr. Ton Yow Hom, whom I shall refer to as Mr. Hom
10 hereafter.

11 I will discuss those charges with you in
12 detail in a moment. But before that, I want to give you
13 a few preliminary and general instructions.

14 First, you are to perform your duty as jurors
15 without bias or prejudice to or for anybody, whether the
16 Government or Mr. Hom. The law does not permit jurors,
17 and you wouldn't want it to permit jurors, to be governed
18 either by sympathy or swayed by prejudice or public opinion.

19 In that connection, I want to point out that
20 although this case involves narcotics, the subject matter
21 of this case has nothing to do with your deliberations,
22 except that it is one of the facts you must find, that what
23 was distributed was a narcotic.

24 But you do not find a man guilty or not guilty
25 because of the nature of the charge. You find him guilty

1 jgbg 8

2 or not guilty only depending on whether you find that the
3 Government has proven the charges against him beyond a
4 reasonable doubt or not.

5 Now, both parties to this lawsuit stand before
6 you as equals. The fact that the prosecution is brought
7 in the name of the Government does not change this, as
8 you know. You are not to favor the Government, nor are
9 you to favor Mr. Hom.

10 Moreover, a trial is not a personality contest
11 between the parties or their lawyers. You are not to
12 consider whether one lawyer may be more pleasant or charming
13 than the other, nor that objections and legal arguments
14 may have been boring to you or time-consuming. The lawyers
15 have a duty to make legal objections and arguments when
16 in their professional opinion they deem it necessary for
17 the proper representation of their respective clients.

18 Now, second, we start with the proposition
19 that we started with at the outset of the trial, that is,
20 that the law presumes every defendant to be innocent
21 against every charge made against him.

22 You will recall that when you were selected
23 I specifically asked each one of you if you could enter
24 into the discharge of your duties presuming the defendant
25 to be innocent and until proven guilty beyond a reasonable

1 jgbg 9

2 doubt after your own deliberations, and each of you gave
3 me the answer yes. This presumption of innocence alone
4 is sufficient to acquit any defendant unless and until
5 the jurors have unanimously satisfied themselves, if they
6 do, beyond a reasonable doubt of the defendant's guilt as
7 to the particular charge in question.

8 Now, the burden or responsibility is on the
9 Government to prove a defendant guilty beyond a doubt of
10 every essential element of each crime charged, and I will
11 advise you later just what these elements are.

12 Third, I want to remind you of what I mentioned
13 at the outset of the trial, that is, that the existence
14 of the indictment does not constitute evidence against
15 Mr. Hom but is merely a method of bringing a charge. The
16 indictment in this case, as you know, contains two counts.
17 Each count contains a separate crime and each of the
18 charges must be separately considered.

19 Now, I have said many times throughout the
20 trial that the Government has assumed the responsibility
21 of proving the defendant guilty beyond a reasonable doubt.
22 Let me define that important term for you at the outset.

23 A reasonable doubt is not a vague, speculative
24 or imaginative doubt. It is a doubt which, as the phrase
25 suggests, is based upon reason and which comes either from

1 jgbg 10

2 the evidence or from the lack of evidence. It is a doubt
3 which a reasonable man or woman might entertain. It is
4 a doubt, and I think this is the best definition, which
5 would cause reasonable men or women like yourselves to
6 hesitate to act in connection with matters that are of
7 importance in your own private lives.

8 Let us say you have an important decision to
9 make. How do you go about making that decision? You
10 think about everything you know about it and you think
11 about everything you would want to know and haven't been
12 told, and you say to yourself: Do I have enough information?
13 Do I have enough dependable information so I am ready to
14 act? If you say I don't have enough, then you have a
15 reasonable doubt.

16 A mere suspicion can't justify conviction.
17 Suspicion is no substitute for evidence. Nor is it
18 sufficient to convict if you find that the circumstances
19 merely render the guilt of a defendant probable. The law
20 does not deal in probability.

21 On the other hand, in saying that the Govern-
22 ment must prove his case beyond a reasonable doubt, if
23 there is to be a conviction, I do not mean, and the law
24 is not, that the Government is required to prove guilt
25 beyond all possible doubt. Indeed, in human affairs it is

1 jgbg 11

2 hard to think of anything we can prove beyond all possible
3 doubt with the exception of mathematical propositions.
4 But the proof must be of such a convincing character that
5 you would be willing to rely and act on it in the important
6 decisions of your own affairs.

7 The evidence in this case, as I've told you
8 a number of times, consists of the testimony of witnesses,
9 the exhibits which have been received in evidence, and
10 facts which have been stipulated or agreed by counsel.
11 You have to decide the case based solely on the evidence.
12 But in your consideration of the evidence, you are not
13 limited to the bald statements of the witnesses. By using
14 the word "bald," I don't mean to suggest anything about
15 the character of the testimony, but I do mean that you are
16 entitled to and you are obliged to think beyond the mere
17 words that have been uttered.

18 In deciding the many questions before you,
19 it is your job to determine the credibility of the witnesses
20 who have testified. Credibility, of course, means
21 believability. How do you go about that? Perhaps the
22 best answer is to say that you determine the truthfulness
23 or accuracy or weight to be given to a witness' testimony
24 in the same way that you would determine such questions
25 in your own personal affairs.

1 jgbg 12

2 We are all constantly called upon from day-to-
-3- day to determine how much confidence we place in the
4 statements that people make to us. The truthfulness or
5 dependability of a witness, as that of any other person,
6 can be determined and must be determined by his demeanor
7 or look, his relationship to the case and to the parties,
8 the possibility of his being biased or his not being biased
9 or impartial, the stake he may have in the outcome of the
10 case, the reasonableness or unreasonableness of his state-
11 ments, the strength or weakness of his recollection, and
12 the extent to which what he has said has been either
13 corroborated or contradicted, as the case may be, by the
14 testimony of other witnesses or by exhibits or stipulations.

15 In ordinary life, when you determine the
16 truthfulness of a person, you ask yourself, don't you, as
17 you should here, did he impress me? Did his version seem
18 straightforward and candid? Did he seem to be trying to
19 hide some facts or did he have any motive to testify
20 falsely, or no motive?

21 Now a few special pointers about the witnesses
22 in this case. The testimony of a law-enforcement official,
23 by the way, is to be measured no differently from that of
24 any other witness. The same standards apply. The uniform
25 or badge in and of itself neither adds nor detracts from

1 jgbg 13

2 the weight to be given to a law-enforcement witness'
3 testimony.

4 A special word is appropriate as to the
5 testimony of Mr. Lock. It is often necessary for the
6 Government to use informants to secure information. In
7 certain types of crimes, detection would be extremely
8 difficult if informants could not be used. The law
9 recognizes the legitimacy of the use of informers, provided
10 the rights of defendants are not violated.

11 Nevertheless, you are entitled to consider
12 that an informer is an interested witness because he has
13 an interest in the outcome of the case by reason of his
14 relationship to the authorities. The testimony of an
15 informer who provides evidence for personal advantage
16 should, therefore, be examined with scrutiny and after
17 being so scrutinized, however, you should give it such
18 weight as you believe it deserves.

19 Ladies and gentlemen, as I've told you, your
20 determination in this case is to be based on the evidence.
21 Now, there are two types of evidence to which we normally
22 refer. I'm sure you've heard them spoken of often. One
23 is called direct evidence. That's the evidence of an eye-
24 witness or an earwitness. I have heard it, such a witness
25 would say, or I have seen it myself.

1 jgbg 14

2 The other is more indirect and is generally
3 called circumstantial evidence. Circumstantial evidence
4 is defined as the proof of a chain of events or circum-
5 stances which itself points to the existence or non-
6 existence of facts as to which there wasn't any eyewitness
7 or earwitness.

8 The law makes no distinction as to the
9 importance or weight to be given to circumstantial as
10 distinct from direct evidence. It requires only that you,
11 the jury, find the facts in accordance with the evidence
12 in this case both direct and circumstantial beyond a
13 reasonable doubt.

14 Now, ladies and gentlemen, the United States
15 Attorney and defense counsel have both from time to time
16 during the course of the trial objected to the introduction
17 of evidence or addressed arguments to the bench. As I
18 mentioned earlier, it is the duty of attorneys on both
19 sides to make such objections when an attorney believes
20 that the other side is proposing to put into evidence or
21 ask questions about something that is not properly
22 admissible. I want you to understand that when I have
23 sustained an objection to a question or when I've over-
24 ruled an objection to a question, that does not indicate
25 any attitude of mine towards the case. What it means, and

1 jgbg 15

2 the only thing it means, 's that if I have sustained an
3 objection or told you to disregard certain testimony or
4 evidence or information, you are to disregard the question
5 or the answer, as the case may be; and where I have ruled
6 against the question, not to try to figure out what a
7 witness might have answered if he had been allowed to
8 do so.

9 Now, ladies and gentlemen, that I have
10 instructed you as to the manner in which you should
11 consider the evidence, and since you heard quite adequate
12 summaries yesterday evening of the respective contentions
13 of counsel, I will turn to the substance of the charge,
14 or charges, against Mr. Hom.

15 The indictment, as you know, contains two
16 counts. Each count, as I mentioned before, is a separate
17 offense and each must be considered separately by the jury.

18 The charge in this indictment relates to
19 alleged violations of the federal law, Sections 812 and 841
20 of Title 21 of the United States Code. The relevant part
21 of Section 841 provides, and I'm now reading from the Act
22 of Congress:

23 "It shall be unlawful for any person knowingly
24 or intentionally to distribute a controlled substance."

25 Section 812 sets forth controlled substances

1 jgbg 16

2 in various so-called schedules. Section I of Section 812
3 lists heroin and any derivative thereof as a narcotic
4 drug controlled substance, the distribution of which is
5 illegal under Section 841.

6 Count 1 of the indictment before you charges
7 that on February 27, 1976 Mr. Hom distributed approximately
8 25.3 grams of heroin hydrochloride.

9 Count 2 of the indictment charges that on
10 March 19, 1976 the defendant distributed about 72.3 grams
11 of heroin hydrochloride.

12 Actually, the indictment charges in both
13 counts that Mr. Hom distributed or possessed with intent
14 to distribute. However, I take it from the proof before
15 you that the Government is charging Mr. Hom actually did
16 distribute the heroin in question.

17 Before you may find Mr. Hom guilty of the
18 crimes charged, you must be convinced that the Government
19 has proven the following elements beyond a reasonable
20 doubt.

21 First, that on or about the dates mentioned
22 in the indictment, February 27, 1976 and March 19, 1976,
23 the defendant distributed a narcotic drug controlled
24 substance.

25 Second, that the defendant, Mr. Hom, did so

1 jgbg 17

2 unlawfully, willfully and knowingly.

3 And third, that the controlled substance
4 which he distributed was heroin.

5 I instruct you as a matter of law that heroin
6 is a narcotic drug controlled substance. However, you
7 must still find beyond a reasonable doubt that the sub-
8 stance in the Government's exhibits was, in fact, heroin.

9 Now, the first element which you must find
10 beyond a reasonable doubt in order to convict Mr. Hom on
11 either count is that he distributed a narcotic drug
12 controlled substance. According to the law, the term
13 "distribute," which really has very much the same meaning
14 as it does in lay language, means the actual or attempted
15 transfer. In a case like this, transfer of controlled
16 substances.

17 The Government charges here and claims that it
18 has proven that Mr. Hom distributed or transferred the
19 material, or rather he distributed it by intentionally
20 transferring it to Mr. Lock on both occasions, February 27
21 and March 19.

22 As to the second element, the term "unlawfully,
23 intentionally and knowingly" means that Mr. Hom knew what
24 he was doing, that he did it deliberately and voluntarily
25 as opposed to mistakenly or accidentally, or as a result

1 jgbg 18

2 of some coercion.

3 Of course, it is not necessary, in order to
4 find this element of the crime, that a defendant knew he
5 was violating any particular law. Rather, it is sufficient
6 if you are convinced beyond a reasonable doubt that Mr. Hom
7 was aware of the general unlawful nature of his acts.

8 As to the third element, the indictment
9 charges that the narcotic drug controlled substance is
10 heroin. I instruct you as a matter of law that heroin is
11 a narcotic drug controlled substance. However, although
12 the parties have stipulated that if the Government's
13 chemist had testified, he would have testified that the
14 material in Exhibits 1 and 3 contains heroin, you must
15 still make the finding, as a jury, beyond a reasonable
16 doubt that the substance in those exhibits is heroin.

17 Now, I have said that to convict you must find
18 that Mr. Hom transferred controlled substances knowingly
19 and intentionally. Knowledge and intent exist in the mind.
20 Since it is not possible to look into a man's mind to see
21 what went on, the only way for you to arrive at a decision
22 on these questions is for you to take into consideration
23 all of the facts and circumstances shown by the evidence,
24 including the exhibits, and to determine from such facts
25 and circumstances whether Mr. Hom had the requisite

1 jgbg 19

2 knowledge and intent at the time that he acted, if you
3 find that he did distribute heroin.

4 Direct proof is unnecessary. Knowledge and
5 intent may be inferred from the surrounding circumstances.

6 One other instruction with regard to intent.
7 You have heard testimony which alleged that Mr. Hom
8 entered into negotiations with Mr. Lock for the sale of
9 heroin at a time after the dates charged in the indictment.
10 You may consider such testimony, if you find it true, in
11 determining whether Mr. Hom acted with intent to distribute
12 heroin on the two occasions charged in the indictment.

13 I come now to advise you of a particular
14 defense which may be applicable in cases of this kind.
15 Where a person who is charged with crime is found by the
16 jury to have no previous intent or purpose to violate the
17 law but is induced, if the jury so finds, or persuaded
18 by law-enforcement officers or their agents to commit a
19 crime, he is what the law calls a person who has been
20 entrapped, and the law as a matter of policy forbids his
21 conviction in such a case.

22 In this connection, I charge you that Mr. Lock
23 was an agent of law-enforcement officers, and I charge you
24 that the law on this subject is as follows:

25 If you find from the evidence that Mr. Lock

1 jgbg 20

2 made the first approach to Mr. Hom and induced or persuaded
3 him to procure drugs for him, then you must find Mr. Hom
4 not guilty unless the evidence convinces you beyond a
5 reasonable doubt that Mr. Hom was ready, willing and able
6 to have engaged in the transactions described without
7 Mr. Lock's inducement or persuasion.

8 In other words, if you do find that Mr. Hom
9 was ready, willing and able to enter into these trans-
10 actions without Mr. Lock's inducement, then it is not a
11 defense that Mr. Lock induced him. But if you find that
12 without Mr. Lock's actions Mr. Hom would not have been
13 ready to do these transactions, then you should acquit
14 Mr. Hom.

15 Now, in telling you what the law is on this
16 subject I hope you understand that I am not suggesting
17 what the outcome of this case should be but merely giving
18 you instructions as to the law.

19 Finally, one further instruction as to special
20 aspects of this case. There has been some mention during
21 the course of the trial as to whether the investigating
22 agents in this case could have utilized such investigative
23 tools as wiretaps, electronic listening devices or bugs
24 and search warrants.

25 While there is no necessity that an agent

1 jgbg 21

2 utilize every investigative tool available to him or her,
3 I want to impress upon you that the use of such devices
4 is strictly proscribed or governed or prohibited in some
5 instances by constitutional principles to certain limited
6 instances. The law is that in order to be authorized to
7 use a wiretap or an electronic listening device or bug,
8 a law-enforcement agent is required to show a judge or
9 other judicial officer that there is probable cause to
10 believe that a crime is being committed, and they must
11 demonstrate why other investigative techniques have failed
12 or would fail, in order to justify the use or the
13 authorization of the electronic listening device.

14 In other words, a wiretap or a listening
15 device cannot be automatically obtained without first
16 utilizing or attempting to utilize other investigative
17 tools.

18 Now, with respect to the use of a search
19 warrant, the law requires that before a search warrant can
20 be obtained, an agent must demonstrate to a judge or
21 other judicial officer that there is probable cause to
22 believe that there is contraband on the premises, that is,
23 in a case like this, probable cause does not, however,
24 mean mere speculation. There must be some proof put before
25 a judge that there is contraband on the premises, before

1 jgbg 22

2 a search warrant for contraband may be granted.

3 Ladies and gentlemen, in every criminal case
4 there is a fundamental rule which every defendant has
5 the right to rely on. That is a rule that a defendant
6 may not be compelled to take the witness stand or offer
7 any testimony at all. Pleading not guilty, a defendant
8 has, in effect, denied every material issue against him
9 stated in the indictment. It is the prosecution which
10 must prove him guilty and he cannot be required to dis-
11 prove anything.

12 An accused person has the right to take the
13 stand or to stand mute. The fact that he does not take
14 the stand, and Mr. Hom has not in this case, may not be
15 construed by any of you as any indication of guilt on
16 his part or any admission on his part or any inference of
17 guilt. This is not just an artificial rule. If you were
18 accused of a crime, you would feel that there is no reason
19 for you to prove yourself innocent. However thoroughly
20 you would be convinced of your own innocence or knew of it,
21 you would understand that it is the Government's job to
22 prove you guilty, if it can.

23 Ladies and gentlemen, I have come nearly to
24 the end of my formal instructions, but in a sense the
25 most important part of what I want to say is coming now.

1 jgbg 23

2 That is with regard to your role as jurors, because it is
3 for you and you alone to decide whether Mr. Hom is guilty
4 of either of the counts charged.

5 I know that you will try the issues that have
6 been presented to you in accordance with the serious oath
7 that you took as jurors, in which you promised that you
8 would well and truly try the issues joined in this case
9 and, as you may remember from my repeating it from time
10 to time when I was impaneling the jury, based solely on
11 the evidence which you have had put before you in this
12 trial and the instructions as to the law which I am now
13 giving you, render a true and just verdict.

14 I like that phrase, "well and truly try the
15 issues joined in this case." It goes back a thousand
16 years and its old-fashioned flavor should mean something
17 to you and remind you of the hundreds of thousands of
18 juries who have performed this function before you and
19 that you must a true verdict render based on the evidence
20 you've heard in this court and the exhibits.

21 In order for you to reach a verdict, either
22 not guilty or guilty, on either count your verdict must,
23 of course, be unanimous. That is, everybody must agree
24 on the particular verdict.

7 In spite of the requirement of unanimity,

1 jgbg 24

2 each of you, however, must decide each count as to Mr. Hom
3 individually, in accordance with your own conscience, but
4 only after deliberation with your fellow jurors to
5 determine whether you believe that a just verdict has been
6 reached.

7 You must not hesitate to change your mind if
8 you become convinced that your original view of the case
9 didn't accord with the facts or the law or whatever it is.

10 On the other hand, you shouldn't change your
11 view just for the purpose of reaching a verdict as a
12 matter of convenience. I really have no reason to believe
13 that this jury won't be able to reach a unanimous verdict
14 one way or the other on each count.

15 To sum up, if you find that there is a
16 reasonable doubt that the law has been violated as to
17 Mr. Hom on either count, you should not hesitate for any
18 reason to acquit Mr. Hom on that count.

19 On the other hand, if you find that the law
20 has been violated and that the Government has proven it
21 beyond a reasonable doubt as charged as to either count,
22 you may not hesitate because of sympathy or any other
23 reason to render a verdict of guilty as to Mr. Hom on
24 that count.

25 Nothing I have said in these instructions,

1 jgbg 25

2 and I stress this, is intended to indicate any view of
3 mine as to how the issues put before you should be decided.

4 Ladies and gentlemen, according to custom,
5 Juror Number 1 normally acts as foreman or forelady of
6 the jury in this court, and I am going to ask Mrs. Cherry
7 to do so in this case. That does not mean that she will
8 have any authority that the rest of you don't have but
9 simply that she will assist in seeing to it that your
10 deliberations are orderly and that all communications to
11 the Court are properly made.

12 You have the right at any time, ladies and
13 gentlemen, to ask for any of the exhibits. You have the
14 right to ask any of the testimony to be read to you, any
15 of the tape exhibits to be played, if you should wish.
16 But I can't say that I encourage you to do that.

17 You have the right to put any question that
18 you want to the Court. If you do wish to have any testimony
19 read back to you or any exhibit, it would be very helpful
20 if you will be as specific as possible about the material
21 that you are interested in so that we can be assisted in
22 locating the material as quickly as possible.

23 Of course, the way you get in touch with the
24 Court will be to give a note to the marshal, who will be
25 standing outside the door of your jury room. I don't

1 jgbg 26

2 mean to encourage you or discourage you in asking for
3 anything, but you certainly have the right to ask for anything
4 you wish.

5 It is not my practice, ladies and gentlemen,
6 to send in all the exhibits, plunk them down on the jury
7 room table, and leave them there. However, if you prefer,
8 when you start your deliberations, to have all the exhibits
9 before you, all you have to do is write a note saying that.
10 If, on the other hand, you just want a particular exhibit,
11 you can ask for that.

12 I will also say, because sometimes a jury
13 asks, that the Judge's charge, which I've just given you,
14 will not be sent in to you. I hope it has been clear.
15 But if it has not been clear, then I'm afraid it will be
16 less clear if I send it in to you and you all tried by
17 yourselves to figure out what it meant.

18 If you do have any questions about my charge
19 or what the law is, simply write me a note saying that you
20 have a question and you want to come out and tell me what
21 your question is or specify what your question is in your
22 note and I will answer it.

23 Finally, let me say that I will ask the Clerk
24 to give you a copy of the indictment so that you can have
25 that available to look at if you wish to for your efforts.

1 jgbg 27

2 Ladies and gentlemen, I have completed my
3 charge to you. I want to confer briefly with counsel in
4 the robing room to see whether they believe that it requires
5 clarification in any way and we'll return directly. So
6 just make yourselves comfortable while we confer.

7 One other thing. I have prepared a little
8 paper which specifies the two counts of the verdict and
9 indicates not guilty or guilty so you can record the
10 verdict of the jury, Mrs. Cherry.

11 Unfortunately I have left it upstairs, but I
12 will have my staff bring it downstairs and I will see to
13 it that it is given to the marshal to give to you after
14 you start your deliberations.

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

-V- :

TON HOM YOU :

-----X
United States Courthouse
Foley Square
New York, New York

February 8, 1977
3:47 p.m.

APPEARANCES:

REBEA NEUGARTEN, ESQ.,

Assistant United States Attorney

ANN DULE

Acting Grand Jury Reporter

NATIONAL REPORTING INC.

CERTIFIED SHORTHAND REPORTERS

FIVE WORLD TRADE CENTER

NEW YORK, N. Y. 10048

[212] 466-1280

5123

1
2 JAMES EDWARD KIBBLE, called as a
3 witness, having been duly sworn by the Foreman of the
4 Grand Jury, testified as follows:

5 THE FOREMAN: For the record, state your name and
6 spell it.

7 THE WITNESS: James Edward Kibble, K-i-b-b-l-e.

8 BY MS. NEUGARTEN:

9 Q Are you employed, Mr. Kibble?

10 A Yes, I am.

11 Q In what capacity?

12 A I'm a Special Agent with the Drug Enforcement
13 Administration.

14 MS. NEUGARTEN: Much of what Mr. Kibble will be
15 testifying to will be information he has gained on a
16 hearsay basis, which is to say that he does not have
17 direct knowledge of the facts. As you know, the Grand
18 Jury is empowered to indict on the basis of hearsay
19 information, but should you desire to have witnesses
20 with direct knowledge of the facts brought before you,
21 you can, of course, ask that those witnesses be brought
22 before you.

23 Q Now, Special Agent Kibble, directing your attention
24 to February 26, 1976, were you advised by a confidential
25 informant that he, the confidential informant, had arranged

1
2 to purchase one ounce of brown rock heroin, number three,
3 from one Ton You Hon?

4 A Yes.

5 Q And would you spell that name for the Reporter?

6 A First name T-o-n, middle name Y-o-u, family name
7 H-o-m.

8 Q On the next day, February 27, 1976, did you have
9 occasion to meet with the confidential informant?

10 A Yes, I did.

11 Q And on that occasion was he searched by you?

12 A This is February 27th?

13 Q 27th, 1976.

14 A Yes, he was.

15 Q And did the search reveal that he had no narcotic
16 substances on his person at that time?

17 A Yes, he did.

18 Q And was he then given \$3,000 in official advance
19 funds in order to purchase one ounce of heroin?

20 A Yes, he was.

21 Q Did you also at that time place a Nagra body
22 recorder on the confidential informant?

23 A Yes, I did.

24 Q Did you thereafter accompany the confidential informant
25 to a location in the vicinity of Chinatown?

1
2 A Yes.

3 Q And was he thereafter put under surveillance as he,
4 the confidential informant, entered a building at 70
5 Bayard Street, B-a-y-a-r-d, in Chinatown?

6 A Yes.

7 Q And was that at approximately 1:05 in the afternoon?

8 A Yes, it was.

9 Q And at approximately 1:20 in the afternoon was the
10 informant observed leaving the building at 70 Bayard Street?

11 A Yes, he was.

12 Q And did you thereafter meet with the informant?

13 A Yes.

14 Q And did he at that time give you one ounce of --
15 strike that.

16 Did he at that time give you a white envelope
17 containing what was later discovered to be heroin?

18 A Yes, he did.

19 Q And did he state that he had purchased the heroin
20 from Ton You Hon?

21 A Yes, he did.

22 Q At the same time did you search the informant again?

23 A Yes, I did, and I removed his Nagra body recorder.

24 Q And did you discover any narcotics other than the
25 substance which he had already given you?

1.
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A No.

Q Now, was a chemist report later prepared on that substance?

A Yes, it was.

Q And was it discovered to be 25.3 net grams of heroin?

A Yes.

Q And that means net of the weight of the packaging?

A That means the package that we received from the informant.

Q But it does not include the weight of the envelope itself, the package?

A No.

Q Now, directing your attention to a period somewhat later, about a month later. On March 16, 1976, were you advised by the same confidential informant that the informant could purchase up to four ounces of brown rock heroin from Ton You Hom?

A Yes.

Q And a few days later, that is on March 19, 1976, did you meet with the confidential informant again?

A Yes, I did.

Q And at that time was the confidential informant searched with negative results?

A Yes.

1
2 Q And at that time was a Nagra body recorder again
3 placed on the confidential informant?

4 A Yes, it was.

5 Q Did you then accompany him to the area in the vicinity
6 of Chinatown?

7 A Yes.

8 Q And was he put under surveillance by Drug Enforcement
9 agents as he entered a building at 70 Bayard Street?

10 A Yes. It was continuance surveillance from the time
11 he left the car.

12 Q And did he enter the building at approximately 12:45
13 p.m.?

14 A Yes, he did.

15 Q Now, at approximately 1:00 o'clock p.m., was the
16 confidential informant observed exiting the building
17 carrying a brown paper bag?

18 A Yes.

19 Q And thereafter did Special Agents meet with the
20 confidential informant?

21 A Yes. Myself and Agent Tolly met with him.

22 Q And at that time did he give you the brown paper bag?

23 A Yes, he did.

24 Q And what were its contents?

25 A There was a smaller brown bag inside and further

1
2 concealed were three white envelopes, each containing
3 approximately one ounce of heroin.

4 Q And did the confidential informant inform you that
5 he had entered apartment number 3 at 70 Bayard Street and
6 that Ton You Hon had given him the three white envelopes?

7 A Yes.

8 Q And did the confidential informant further advise
9 you that at that time he had told Mr. Hon that he, the
10 confidential informant, would return in about 20 minutes
11 with the money for the heroin?

12 A Yes.

13 Q Did you thereafter give the confidential informant
14 ~~\$8,440 in cash?~~

15 A Yes..

16 Q And was he placed under surveillance as he returned
17 to 70 Bayard Street?

18 A Yes, he was.

19 Q At approximately 1:25 p.m., was he observed again
20 exiting 70 Bayard Street?

21 A Yes, he was.

22 Q Did Special Agents thereafter meet with the confidential
23 informant again?

24 A Yes. Myself and Agent Tolly met with him.

25 Q And at that time did the confidential informant tell

1. that he had met with Ton You Hom and had handed over to
2 him the \$8,440?

3 A Yes, he did, and at this time the money was counted
4 and Hom handed back to the confidential informant \$40 which --
5 the bills were stuck together, was an excessive amount of
6 money we had given him, and in addition he gave him \$300
7 for bringing a customer for the heroin.

8 Q So, the \$300 would have been a fee to the confidential
9 informant for providing the customer?

10 A Yes.

11 Q And did the confidential informant then turn over
12 the money to you, that is both the \$300 and the \$40 which
13 Mr. Hom had returned as excess payment?

14 A Yes, he did.

15 Q And at the same time, did you recover from the
16 confidential informant the Nagra recording device?

17 A Yes, I did.

18 Q And was a chemist report subsequently prepared on the
19 contents of the three white envelopes?

20 A Yes, it was.

21 Q And were they discovered to contain 72.3 net grams
22 of heroin?

23 A Yes, it was.

24 MS. NEUGARTEN: I have no further questions of
25

1
2 the witness at this time. Would you ask that he be
3 temporarily excused?

4 THE FOREMAN: You're excused. Would you wait
5 outside, please?

6 (Witness excused.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HEMLOCK
ERASABLE
COPY CONTENT

BEST COPY AVAILABLE

1 eoss

2 THE CLERK: United States of America versus
3 Ton Yow Hom.

4 MR. COSTELLO: Government ready.

5 MR. THAU: Defendant ready, your Honor.

6 THE COURT: Before we actually proceed to sentencing,
7 Mrs. Lin, have you been sworn?

8 (Mrs. Caroline Lin was sworn as the Chinese
9 Interpreter by the Clerk of the Court.)

10 Mrs. Lin, will you translate simultaneously as
11 I talk or the attorneys do.

12 THE INTERPRETER: Yes.

13 THE COURT: There are pending before the Court
14 two motions by the defendant. one to dismiss the indictment
15 and one to set aside the verdict on the grounds that the
16 verdict was against the weight of the evidence or not
17 supported by the evidence.

18 Both motions are denied. The motion to set
19 aside the verdict in my opinion has no basis whatsoever.

20 I do not suggest that a jury in this case might
21 not have justifiably acquitted Mr. Hom, since the case
22 was one of circumstantial evidence only and since the jury
23 was free to believe one witness or another.

24 The question, however, is not whether the jury
25 might have done that, but whether the jury was obligated to

2 do that, that is, whether no reasonable juror could have
3 found Mr. Hom guilty beyond a reasonable doubt.

4 I did not believe at the time that the motion was
5 made at trial, as I assume it was, to grant a judgment of
6 acquittal that it would have been proper for the Court
7 to do so and I do not believe at the present time it would
8 be proper for the Court to set aside the verdict, since
9 I cannot conscientiously agree that no reasonable juror
10 could have found Mr. Hom guilty beyond a reasonable doubt.

11 With regard to the other motion to dismiss the
12 indictment, while the motion is denied, the claim, it seems
13 to me, has certainly more merit than the claim or motion to
14 set aside the verdict.

15 The motion to dismiss is based on the claim
16 that under the doctrine of United States against Estepa,
17 a Second Circuit decision, which requires a Grand Jury to
18 be aware of its right to hear firsthand witnesses and not
19 to be required to make an indictment on hearsay testimony
20 alone, that there should be an extension of that doctrine
21 in situations in which, as here, a principal witness before
22 the Grand Jury testified as to conversations with either
23 the informant -- it was the informant -- without advising the
24 Grand Jury that substantial portions of those conversations
25 were through an interpreter.

1
2 If I were not satisfied, as I am, that the Grand
3 Jury witness, Agent Kibble, was able to communicate with
4 reasonable ease, although by no means perfectly, with
5 the informant without an interpreter. I would have considered
6 that there was a very serious question posed by the motion
7 to dismiss the indictment.

8 However, I am satisfied from the record, and I
9 will make reference particularly to the sections of Mr.
10 Kibble's testimony beginning at page 142, 162, which are
11 on both redirect and recross, that Mr. Kibble did, in fact,
12 have substantial communication with the informant, whose
13 name escapes me at the moment, Mr. Lock, I believe, in
14 pidgin English, slow conversation and by gesture, and
15 that the Grand Jury was not misled in believing that Mr.
16 Kibble had firsthand knowledge of what he said that the
17 informant told him.

18 Moreover, the Grand Jury was advised that, in
19 accordance with the rule of Estepa, it was hearing hearsay
20 testimony and of course had the right to hear the informant
21 himself if the Grand Jury had wished to do so. I do not
22 mean to suggest that that advice to the Grand Jury is a
23 per se cure for the complaint made by the defendant here and
24 I recommend most forcefully to the United States Attorney's
25 Office that in the future, where a witness testifies before

1
2 a Grand Jury as to conversations which have taken place
3 through an interpreter, that he make it clear to the
4 Grand Jury that that is the case, just as the United States
5 Attorney is required to make it clear to the jury when
6 hearsay is involved.

7 However, in the circumstances of this case, I do
8 not believe that the Grand Jury was misled, and the motion
9 is therefore denied.

10 I am ready now to proceed to sentencing.

11 MR. THAU: Your Honor --

12 THE COURT: Is there anything, Mr. Costello,
13 you want to say in regard to sentencing? I am not suggesting
14 it is necessary, but you are here and I want to know.

15 MR. COSTELLO: No, your Honor, not with respect
16 to sentencing.

17 MR. THAU: Your Honor, forgive me for backtracking
18 a short instant, if I might.

19 I received this morning--I am not holding Mr. Costello
20 for this because I sent up my memorandum on the Rule
21 29 motion but a few days ago--I received his answering
22 memoranda and, although the Court has ruled, I would
23 have wanted a very short opportunity to respond on the
24 record and it really will be short.

25 Your Honor I know from experience, and it is

CERTIFICATE OF SERVICE

August 31 , 1977

I certify that a copy of this [REDACTED] and appendix has been mailed to the United States Attorney for the Southern District of New York.

Barry Bassis